IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

versus

PPG INDUSTRIES, INC., and CONOCO, INC.,
Respondents.

OPPOSITION OF RESPONDENT CONOCO, INC. TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GENE W. LAFITTE
J. BERRY ST. JOHN, JR.
One Shell Square, 50th Floor
New Orleans, Louisiana 70139

Attorneys for Respondent
Conoco, Inc.

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR and
DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,
Petitioners,

versus

PPG INDUSTRIES, INC., and
CONOCO, INC.,
Respondents.

OPPOSITION OF RESPONDENT CONOCO, INC. TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent, Conoco, Inc., who appeared as Intervenor below, herein opposes the petition for certiorari filed on June 29, 1979, on behalf of Petitioners Adlene Harrison and Douglas M. Costle.

QUESTION PRESENTED

Whether Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1), confers original and exclusive jurisdiction on the courts of appeals to review final actions by the Administrator of the U.S. Environmental Protection Agency applying new source performance standards to particular facilities.

STATEMENT OF THE CASE

Respondent Conoco, Inc., concurs in the Supplemental Statement of the Case set forth in the Memorandum in Opposition filed by Respondent PPG Industries, Inc.

REASONS FOR DENYING THE PETITION

1. There Is No Conflict Among the Relevant Decisions of the Courts of Appeals.

Petitioner has asserted that there are some 90 actions now pending which depend on the meaning of the "any other final action" clause of Section 307(b)(1) to determine proper jurisdiction. (Petition at 13 n.8.) Petitioner then states that the decision of the Fifth Circuit in *PPG Industries, Inc. v. Harrison*[1] creates serious problems in administering the Clean Air Act. However, an examination of the decisions dealing with this jurisdictional issue shows that the courts of appeals have had no difficulty in arriving at nonconflicting results.

1 587 F.2d 237 (5th Cir. 1979).

Only the Fifth and Third Circuits have considered whether the addition of the "any other final action" language by the 1977 Amendments to the Clean Air Act requires that all final agency action be subject to initial review in the courts of appeals. In *PPG Industries, Inc. v. Harrison,* the Fifth Circuit reviewed the legislative history of the 1977 Amendments in an attempt to discern what type of action was included within that phrase. Because the legislative history addressed only venue and did not mention a major shift of jurisdiction to the courts of appeals, the court sought other guides to the construction of the phrase. The court concluded that Congress drafted Section 307(b)(1) with the limitations on the ability of the courts of appeals to develop facts in mind.[2] Thus, the court held that an EPA action that was so informal that it gave rise to a record unsuited to court of appeals review was not included within the "any other final action" phrase in Section 307(b)(1).[3]

In *United States Steel Corp. v. EPA,* 595 F.2d 207 (5th Cir. 1979), the Fifth Circuit was again faced with a challenge to its jurisdiction to review agency action under Section 307(b)(1). Finding that it had jurisdiction, the court distinguished its earlier decision in *PPG Industries, Inc. v. Harrison.* Because the *U.S. Steel* case involved a sub-

2 587 F.2d at 245.

3 587 F.2d at 245.

stantial record growing out of a *rulemaking* proceeding, the factors which led to the decision in *PPG Industries* were not present. In *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3rd Cir. 1979), the Third Circuit treated the same jurisdictional question briefly. Like the Fifth Circuit in *U.S. Steel*, the court found that *PPG Industries* did not apply because in the case before it EPA had taken rulemaking action pursuant to 5 U.S.C. §553.

Thus, the three reported decisions that have considered the "any other final action" clause of Section 307(b)(1) do not conflict. In the absence of any conflict among the courts of appeals, there is as yet no need for Supreme Court review.

Finally, the issue raised by the decision in *PPG Industries* is potentially complex. The Fifth Circuit, for example, has characterized EPA's interpretation of Section 307(b)(1) as indicating "a massive shift of jurisdiction to the courts of appeals."[4] In this situation, it is well to recall the Supreme Court's recognition of "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals." *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977). The considerations expressed by the Supreme Court in this regard are equally applicable to the case at bar.

4 587 F.2d at 243.

2. The Decision Below is Narrowly Drawn and Therefore of Limited Applicability.

By its terms, the decision applies only to those situations in which the agency action was so informal that it produced an administrative record clearly insufficient to provide an adequate basis for judicial review in the courts of appeals. As the court of appeals observed, the administrative record in the instant case is comprised of nothing more than a collection of correspondence between the agency and respondent PPG Industries, Inc.[5] A perusal of this correspondence reveals a near total lack of articulable bases for the agency's determination that the waste-heat boilers in question are new sources subject to new source performance standards under the Clean Air Act. The Administrator's "reasons" for subjecting these facilities to these regulations are not reasons at all, but mere conclusions. It is only in this and similar situations — where the administrative record is so patently incomplete as to afford no meaningful basis for judicial appraisal of the agency's decision-making process — that initial review of agency action is inappropriate at the appellate level.

3. The Decision of the Court of Appeals is Correct.

a. Where the administrative record is clearly insufficient to permit meaningful review of agency ac-

5 587 F.2d at 244.

tion, the court of appeals may refuse to exercise its jurisdiction under Section 307(b)(1). In such a case, review is more properly had in the district court so as to permit fact and record development prior to court confrontation. In reviewing agency action under the Clean Air Act, courts are instructed to enquire whether that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Clean Air Act §307(d)(9)(A), 42 U.S.C. §7607(d)(9)(A). That determination cannot be made where the administrative record consists of only the sparsest of documentation. See *Texas v. EPA*, 499 F.2d 289, 321-22 (5th Cir. 1974) (Clark, J., concurring), *cert. denied*, 427 U.S. 905 (1976). Although remand to the agency for a statement of reasons for its decision is one alternative, that solution "would risk after the fact rationalization, which the evidence gathering power of a trial court can more easily penetrate." *Save the Bay, Inc. v. Administrator*, 556 F.2d 1282, 1292 (5th Cir. 1977). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420-21 (1971). In such a case, the district court becomes the only available forum for meaningful review of agency action.

b. Initial review in the district courts of agency action unsupported by a complete administrative record will not burden the administration of the Clean Air Act. District court review of agency action will only be required in a limited number of cases. Out of the approximately 90 actions now pending against EPA which depend on the meaning of "any other final action" to determine proper jurisdiction, only two, other

than the present case, have involved simultaneous filings in both the district court and the court of appeals. (Petition at 13 n.8.) Where simultaneous filing does occur, it will be a relatively simple matter for the court of appeals to determine on the face of the administrative record that the agency action in question is or is not sufficiently supported so as to warrant initial appellate review. Thus, contrary to Petitioner's assertion that jurisdiction to review EPA action will be left "entirely to chance," that decision will be committed to the sound discretion of the courts of appeals.

Finally, it is the agency's responsibility to ensure that its decisions are supported by an adequate administrative record. The law requires that administrative agencies "articulate the factors on which they base their decisions," *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971), and "explicate fully [their] course of inquiry, . . . analysis and . . . reasoning," *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971). Where the agency has failed to fulfill its proper function in this respect, it cannot be heard to complain of the "burdensome discovery" which may take place in the district courts. The practical effect of the decision below, therefore, is to compel the Administrator to fully and clearly set forth the reasons for his decisions in every instance. This, in turn, will mean that fewer cases need be subject to initial review in the district courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GENE W. LAFITTE
J. BERRY ST. JOHN, JR.
One Shell Square,
50th Floor
New Orleans, LA 70139
Attorneys for Respondent
Conoco, Inc.